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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

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JAMES H. MCKENNEY,
Clerk.

No. 245.

THOMAS G. BUSH, THOMAS A. GILLESPIE, AND ORION L. HURLBUT, AS TRUSTEES IN BANKRUPTCY OF THE SOUTHERN CAR AND FOUNDRY COMPANY, A BANKRUPT, PLAINTIFFS IN ERROR,

versus

J. M. ELLIOTT, JR.

No. 246.

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versus

ELLIOTT CAR COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF AND ARGUMENT FOR APPELLEES.

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For Appellees.

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(19,733 and 19,734.)

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BRIEF AND ARGUMENT ON BEHALF OF APPELLEES.

As the two cases above entitled present for the consideration of the court the same question, it has been agreed between counsel representing appellants and counsel represent-

ing appellees that both cases be submitted together on a single brief.

The facts are as follows: The Southern Car and Foundry Company was a body corporate and a citizen of the State of New Jersey. This corporation was adjudged a bankrupt. Thomas G. Bush, Thomas A. Gillespie, and Orion L. Hurlbut were appointed trustees in bankruptcy of the said Southern Car and Foundry Company. J. M. Elliott, Jr., was a citizen of the State of Alabama. The Elliott Car Company was likewise a citizen of Alabama. The said trustees in bankruptcy brought, in the circuit court of the United States for the northern district of Alabama, two separate actions, one against J. M. Elliott, Jr., and the other against the Elliott Car Company. The allegations in each case, on which jurisdiction was claimed, were substantially the same.

In the case against J. M. Elliott, Jr., the allegations were as follows:

> "Thomas G. Bush, Thomas A. Gillespie, and Orion L. Hurlbut, as Trustees in Bankruptcy of the Southern Car and Foundry Company, a Body Corporate Organized under the Laws of the State of New Jersey and a Citizen of said State, a Bankrupt, Duly Adjudicated by the District Court of the United States Having Jurisdiction of said Bankrupt, and Who Were Duly Appointed Such Trustees by said Court, Plaintiffs,
>
> *vs.*
>
> J. M. Elliott, Jr., Who is a Citizen of the State of Alabama, Defendant.
>
> "The said plaintiffs, as trustees in bankruptcy of the Southern Car and Foundry Company, a bankrupt, as aforesaid, the said Southern Car and Foundry Company being a corporation organized and existing under the laws of New Jersey and a citizen of said State, claim of the said defendant, a citizen of the State of Alabama, the sum of one hundred and fifty thousand dollars for money paid by the said Southern Car and Foundry Company prior to said adjudication

in bankruptcy, to wit, on the 17th day of January, 1901, at his request, which sum of money, with the interest thereon, is still due and unpaid, and is the property of said plaintiffs as trustees as aforesaid. * * * And the said plaintiffs aver, as a part of each and every one of the foregoing counts, that the said Southern Car and Foundry Company is a body corporate organized and existing under the laws of the State of New Jersey and a citizen of said State, and was duly adjudicated a bankrupt in and by a district court of the United States having jurisdiction to make such adjudication, and the said plaintiffs were thereafter duly appointed trustees in bankruptcy of the said Southern Car and Foundry Company and have duly qualified as such, and that the said defendant is a citizen of the State of Alabama."

Thereafter appellee in each case moved the court to dismiss the case for want of jurisdiction. This motion the court below sustained.

The vital question in this case is: Had the circuit court of the United States for the northern district of Alabama jurisdiction of these cases?

It will be observed that the citizenship of the trustees is not averred or made in any way to appear in either of the complaints. It is manifest, therefore, that jurisdiction of the circuit court cannot rest upon diversity of citizenship under the judiciary act.

Coal Company *vs.* Blatchford, 11 Wall., 172.

Appellants are therefore forced to rely upon section 23 of the bankrupt act to support the jurisdiction claimed. Section 23 reads as follows:

"23. *Jurisdiction of United States and State Courts.—a.* The United States circuit courts shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the

trustees, *in the same manner and to the same extent only* as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.

"*b.* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision (*b*), and section sixty-seven, subdivision (*e*)."

The contention on the part of appellants' counsel is that this section confers jurisdiction upon the United States circuit courts of all controversies at law and in equity between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees in which there appears diverse citizenship as between the bankrupt and the adverse claimant, regardless of the fact that no such diverse citizenship is made to appear as between the trustee and the adverse claimant. Our contention, on the contrary, is that section 23 declares that the jurisdiction of the circuit courts of the United States shall extend to no case of the class named in which these courts had not jurisdiction under existing provisions of law.

We insist that the real meaning of subsection (*a*) is that, regardless of whether the trustees in bankruptcy or adverse claimants are plaintiffs, in all controversies at law and in equity between trustees in bankruptcy and adverse claimants concerning the property acquired or claimed by the trustees, the only jurisdiction that shall be exercised by the United States circuit courts is such jurisdiction as is conferred by statutes other than the bankrupt act; and subsection (*b*) is intended to declare that when the suit is brought by the trustee neither the circuit nor the district courts of the United States shall have any jurisdiction except such jurisdiction as already existed under provisions of law other than the

bankrupt act, unless the defendant consents that such jurisdiction be exercised. If subsection (*a*) had stood alone, it could have been asserted with great force that while the jurisdiction of the circuit court had been limited to cases in which the jurisdiction could be based on the judiciary act, yet the jurisdiction of the district court remained as it was under former bankrupt acts; and it might have also been contended with great force that, as the judiciary act itself provides that the circuit courts take jurisdiction of cases which arise under the Constitution or laws of the United States, therefore, under subsection (*a*), circuit courts of the United States would have jurisdiction of suits by a trustee in bankruptcy to recover the assets of the bankrupt estate. Hence the necessity of subsection (*b*), which prevents any such construction, and, aiding subsection (*a*), declares that when the trustee is plaintiff, not only the circuit court, but the district court as well, and all other courts must base their jurisdiction upon the statutes applicable to ordinary cases. The evident intent of the two sections construed together is that, at least so far as suits by trustees are concerned, no court shall acquire any jurisdiction for which a basis cannot be found under the provisions of statutes other than the bankrupt act except by the consent of the proposed defendant. In other words, these sections mean that when the courts come to determine whether or not they have jurisdiction of any given case they should test that jurisdiction by the application of the same rules that govern in ordinary cases.

In referring to subsection (*a*) this court said, in Bardes *vs.* Hawarden, 178 U. S., 537:

> "This clause, while relating to the circuit courts only, and not to the district courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustees does or does not form part of the estate to be

> administered in bankruptcy, shall not be brought within the jurisdiction of the national courts, solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy."

And again, in referring to subsection (*b*), this court says in the case above cited:

> "One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the State, to the greater economy and convenience of litigants and witnesses."

A careful analysis of the language of section 23, subsection (*a*), will show that the construction suggested above is the proper one. It does not declare that the United States circuit courts shall have jurisdiction of all controversies at law and in equity between trustees as such and adverse claimants concerning the property acquired or claimed by the trustee in all cases in which it would have had jurisdiction if the controversy had been between the bankrupt and such adverse claimants, regardless of the fact that there may be no diverse citizenship as between the trustee and the adverse claimant, but it declares that the jurisdiction shall be had in the *same manner and to the same extent only* as though the controversy had been between the bankrupt and such adverse claimant. When the controversy is between the bankrupt and an adverse claimant in the United States circuit court, that court has jurisdiction *in the manner* provided by the judiciary act and the ordinary rules of procedure. The expression "*in the same manner*" therefore prevents the exercise of any summary jurisdiction by the United States circuit court or the exercise of any jurisdiction by the court in any manner other and different from the ordinary jurisdiction.

Then the act proceeds:

> "To the same extent only as though bankruptcy proceedings had not been instituted and such con-

troversies had been between the bankrupt and such adverse claimant."

What is the *manner* in which and the *extent* to which a circuit court of the United States would have had jurisdiction if the Southern Car and Foundry Company had been plaintiff and Elliott defendant? The jurisdiction, in that event, would have been to the *extent* of the cases enumerated in the judiciary act and *none other*. So when the trustee sues or any controversy arises of the class named in subsection (*a*) the jurisdiction extends to the cases enumerated in the judiciary act and *none other*. The test is not, Could the bankrupt have brought the suit in the circuit court of the United States? The test is, Would the jurisdiction of the circuit court be sustained in a suit brought by the bankrupt containing the *same jurisdictional allegations?* The intention is not to provide that the trustee may sue in any court in which the bankrupt might have sued, but that the jurisdiction of the court in both cases shall be had in the *same manner* and to the *same extent*. The intention is to provide that the test of jurisdiction in any given suit of the class named in section 23 shall be the same test of jurisdiction that would have been applied if the suit had been between the bankrupt and the adverse claimant. It was not the intention to provide that the mere fact that the court would have had jurisdiction in the one case draws to it jurisdiction in the other, regardless of the fact that the test applied shows jurisdiction in the one case and fails to show it in the other.

Suppose this controversy had arisen between the Southern Car and Foundry Company, bankrupt, and Elliott. In determining the jurisdiction the test would have been, Does the complaint affirmatively show diverse citizenship between the parties to the suit? The jurisdiction of the United States circuit court would "extend" to this controversy if the complaint affirmatively showed this diverse citizenship. The jurisdiction of the United States circuit court would not ex-

tend to this controversy unless the complaint did show diverse citizenship or some other basis for the exercise of jurisdiction to be found elsewhere than in the bankrupt act. The plain intent of subsection (*a*) is that the jurisdiction of the United States circuit court of such controversies shall extend only to cases provided for by the judiciary act and other legislation than the bankrupt act. When such a case arises in the United States circuit court, the jurisdiction can never depend upon the bankrupt act.

We insist that this contention is directly supported by the opinion of Chief Justice Fuller in the case of Spencer *vs.* Duplan Silk Company, 191 U. S., 526.

In this case Spencer, the plaintiff, was the trustee in bankruptcy of Bennett & Rothrock, bankrupts. Both Spencer and Bennett & Rothrock were citizens of Pennsylvania. The defendant, Duplan Silk Company, was a citizen of New York. The original action was commenced by Spencer in a State court. The case was removed to the United States circuit court by the defendant, and resulted in a judgment for plaintiff in that court. A writ of error was prosecuted to the circuit court of appeals. The circuit court of appeals reversed the judgment of the circuit court and remanded the cause, with instructions to enter judgment for defendant. The plaintiff, trustee in bankruptcy, obtained a writ of error to the Supreme Court of the United States. Section 6 of the judiciary act of March 3, 1891, provides in substance that the judgments rendered by the circuit court of appeals are final in all cases in which the jurisdiction of the circuit court is dependent entirely upon the parties being aliens and citizens of the United States or citizens of different States, and in all other civil actions, if the matter in controversy exceeds one thousand dollars besides costs, there is, as of right, an appeal or writ of error to bring the case to the Supreme Court of the United States. If the jurisdiction of the circuit court in the case of Spencer *vs.* Duplan Silk Company could have been maintained by reason of the fact that the bankrupts

were citizens of the State of Pennsylvania, regardless of the citizenship of the plaintiff, trustee in bankruptcy, it would follow necessarily that the jurisdiction of the circuit court was not dependent entirely upon the parties being citizens of different States. But this court held that the jurisdiction was dependent *entirely* upon the parties being citizens of different States, and for that reason dismissed the writ of error. In other words, a careful analysis of the opinion of Chief Justice Fuller in the case of Spencer *vs.* Duplan Silk Company shows that this court has construed section 23 to mean that in the circuit courts of the United States the jurisdiction of all controversies between trustees and adverse claimants concerning the property acquired or claimed by the trustee arises from and is wholly dependent upon the provisions of the judiciary act. If the jurisdiction of the United States circuit court of any given controversy at law or in equity between trustees as such and adverse claimants concerning the property acquired or claimed by the trustee is to be regarded as *conferred* upon the circuit court by section 23 (*a*) of the bankrupt act, then it follows necessarily that jurisdiction in the case of Spencer *vs.* Duplan Silk Company was not dependent entirely upon the fact that Spencer, the trustee, and the Duplan Silk Company were citizens of different States, and the decision of this court in that case was wrong.

The contention made here by appellants' counsel cannot be reconciled with the opinion of this court in the case of Spencer *vs.* Duplan Silk Company.

The proposition for which we contend is well stated in the Cyc. of Law and Procedure, 5th vol., page 249:

> "The jurisdiction conferred by the section includes controversies at law as distinguished from bankruptcy proceedings. Such jurisdiction must be construed in connection with other provisions of the Federal statutes conferring jurisdiction upon such court. It was not intended to either limit or extend such jurisdiction."

And again the same author, on page 251 of the same volume, clearly states the rule as follows:

> "It follows therefore that where the trustee and the proposed defendant are residents of the same State, all such collateral actions must be brought in the State courts, unless there is consent to the jurisdiction of the United States circuit or district courts."

A clear statement of this proposition will be found also in the fourth edition of Collier on Bankruptcy, page 247, where the learned author, writing of the jurisdiction of the circuit courts, says:

> "*The Same as Fixed by General Law.*—The meaning and purpose of this subsection was clouded for some time by the struggle of many courts so to read it into the succeeding subsection as to limit and control the meaning of the latter. But the words speak for themselves. If diverse citizenship in a controversy where the amount in dispute exceeds two thousand dollars arises between the trustee and an adverse claimant, concerning property acquired or claimed by the trustee, an appropriate suit, either in law or in equity, can be laid in the circuit court, but not otherwise. Thus, in that court, the trustee may be either plaintiff or defendant; while like the adverse claimant, he has the option of proceeding in the State court, or, if the requisite diversity of citizenship and amount in controversy exists, in the circuit court. Conversely, the trustee only can sue in the district court, but only to recover property or to annul liens; and suits there need not show diversity of citizenship and two thousand dollars in dispute. Thus, the jurisdiction of the circuit court is much more limited than it was under the former law; that of the district court limited, it is true, but not to so marked an extent as is that of the other court."

The American and English Enc. of Law, vol. 16, page 755, lays down the same rule in the following language:

> "The circuit courts have jurisdiction of actions at law and suits in equity to recover debts due the bank-

> rupt or to establish the title of the estate to property claimed by third persons in any case where the facts requisite generally to the jurisdiction of such courts exist, except so far as that jurisdiction is limited by the bankrupt law."

Foster's Federal Practice, third edition, page 1151, says:

> "The circuit courts of the United States have no jurisdiction in bankruptcy. They 'have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning property acquired or claimed by the trustees in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.' That is to say, they take jurisdiction of such cases either originally or upon removal, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and which arise under the Constitution or laws of the United States, or treaties made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there is a controversy between citizens of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, or, irrespective of the value of the matter in dispute, where there is a controversy between citizens of the same State claiming lands under grants of different States."

Brandenburg on Bankruptcy, third edition, section 580, page 373, in referring to the case of Bardes *vs.* Hawarden Bank, says:

> "This decision of the Supreme Court determined that the district court of bankruptcy had no jurisdiction of any suits at law or in equity independent of the proceedings in bankruptcy as such; but that all such suits should be brought in the proper court, which is ordinarily a State court, unless the jurisdictional requirements exist outside of the bankrupt law for suing in a Federal court."

In construing legislation of the same nature as the section now under consideration this court has often recognized the intention of Congress to restrict the jurisdiction of the circuit courts.

> Cochran *vs.* Montgomery County, 199 U. S., 260.
> *In re* Pennsylvania Co., 187 U. S., 451.
> Tennessee *vs.* Union and Planters' Bank, 152 U. S., 454.

Our insistence in this case is in line with the sugestion of Mr. Justice Miller in Smith *vs.* Lyon, 133 U. S., 120:

> "It is not readily to be conceived that the Congress of the United States, in a statute mainly designed for the purpose of restricting the jurisdiction of the circuit courts of the United States * * * intended that language should be given a construction which would enlarge jurisdiction of those courts.

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